Commission v Poland: What Happened, What it Means, What it Will Take

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This blog post is dedicated to the European courage of Polish Judge Pawe# Juszczyszyn and his colleagues from the Polish Association of Judges, IUSTITIA

“La Cour”

9 March 2020. It had been marked in many a Polish diary. Would the EU make steps to finally act to stop the backliding? The electronic board in front of the Grande Salle indicates Case C-791/19 R, Commission versus Poland. Even if hearings in Luxembourg are public, they are not easily accessible. You need to be physically present to attend (which is why you should sign this letter calling on the Court of Justice to livestream). Some 60 people do. The occasional KonstyTUcJA t-shirt and pin. They slowly fall silent, staring at the gigantic chandelier hovering overhead.

9.30am sharp. Everybody stands up for the Grand Chamber of the Court to enter. *“La Cour”.* Its task today is to decide on the immediate seizure of the activities of the Disciplinary Chamber of the Polish Supreme Court, populated by judges appointed by a council for the judiciary dominated by PiS (aka neo-KRS). We see a delegation of 5 persons representing Poland, most particularly under-secretary of Justice Darkowska, herself a former judge. We see another delegation of 5 persons representing the Commission. A sheet of paper outside the courtroom states that five Member States intervened to support the Commission in writing: Belgium, The Netherlands, Finland, Denmark and Sweden.

The Commission explains its position crisply. The interim measures are about the second plea in law in the main case, that under the law in force the Disciplinary Chamber does not fulfil the guarantee of independence and impartiality in exercising its jurisdiction for the review of decisions in disciplinary proceedings. It therefore forms a systematic threat to judicial independence and impartiality as recently defined by the Grand Chamber itself in Case C-585/18 e.a. of 19 November 2019 (AK) (see analysis here) because it has acted to discipline judges and will soon be asked to discipline more judges (see this comprehensive report by Iustitia), including for applying Union law. Its existence and functioning present a clear and present danger for the whole Polish legal system.

The Court asks the Commission some clarifications. First, why did it initiate the infringement on 25 October 2019 and then apply for interim measures less than three months later? Why not all at once? What changed? The Commission clarifies that when it brought the case, *AK* was still pending. It banked on that judgment to

give clear guidance and to be applied properly in the Polish legal setting, including vis-à-vis the Disciplinary Chamber. It was wrong. Therefore, the Commission felt forced to correct itself. The Court also wants to know whether the Commission is only after suspending the competences of the Disciplinary Chamber to discipline judges, or also its other competences, relating to labour law issues and the retirement age. The Commission's response gets lost in the multiple interpretations.

"C'est un peu compliqué à comprendre"

The Polish government makes its case too. It is clear that the agent has been chosen as part of a charm offensive: Who better to explain that this is all a neutral and totally objective state of affairs than a former judge who can talk from experience (and now just happens to be delegated to the Ministry of Justice)? It soon becomes clear that this backfires badly, perhaps again due to interpretation issues. Various judges of the Court ask whether they have understood correctly that, in this case about the rule of law and separation of powers, the Polish executive has selected a judge to defend it here. It is likely not the hoped-for effect…

In the main the Polish government argues that the Commission should be non-admissible. There is no urgency. There is also really nothing wrong with the Disciplinary Chamber. An avalanche of data and comparisons is presented to make the contradictory point that things are just as before, only better. The problem is that the Supreme Court's three non-captured chambers, in their resolution of 23 January, overstepped their competence because they applied an abstract Union law explanation by the Court (setting out the requirements of judicial independence and impartiality) in "an abstract way", in that the Supreme Court ruled that the Disciplinary Chamber and the Council of Judiciary did not fulfil these criteria without there being a concrete case that led this to be found. This explanation is repeatedly questioned by the Court's judges, in different ways. The judge-rapporteur, Vice-President Silva de Lapuerta, suggests: *"c'est un peu compliqué à comprendre"*. Is not the point of preliminary rulings that they lay down general rules for national courts to apply in concrete cases? And what is "abstract" about the resolution of the Supreme Court's three non-captured chambers?

When the Polish representative makes a sixth attempt to clarify what the non-captured parts of Supreme Court have done wrong, the mind wanders off for just the briefest of moments. Looking around I ask myself that question which answers why I came. How would I feel if I sat here and my own government would be in that docket saying things so blatantly in bad faith? One thing is for sure: I would really appreciate some friends and support too. This explains why there are national judges from The Netherlands, Belgium and Turkey supporting the delegation of Polish national judges from Iustitia. Interconnectedness works both ways.

Some further baffling and noteworthy exchanges follow. There is a lengthy exposé by the Polish agent arguing why an opposition-tabled amendment to change the law regarding judges (effectively a counter-proposal to neutralise PiS-induced changes) would be even worse than the arrangement she is defending, since it would effectively undo the illegality created in that illegally appointed judges would

be faced out so as to comply with Union law. There is some back-and-forth between her and clearly confused judges, who – once they understand it is a opposition-backed legislative *proposal* without a chance of being passed in the other, PiS backed chamber of parliament – must wonder about the relevance of the argument. Judge Xuereb asks for it to be clarified what judges who are disciplined have been pursued and sanctioned for? The Polish agent clarifies that it is things like drink and drive. Judge Xuereb's further question whether disciplining has or can have anything to do with applying Union law is answered in the negative by the Polish agent (contrary, by the way, to the truth – see here about the case of judge Pawe# Juszczyszyn). Xuereb adds: "because that would lead me to drink, I think."

President Lenaerts closes the hearing some two hours after it started. He explains that the Court will rule in due course, after hearing its Advocate-General without that advice having to be in writing. It is therefore left entirely open whether we should expect a ruling within 3 days or 3 months.

Compliqué, mais pas trop…: some reflection(s) on action(s)

It is tempting to describe 9 March 2020 as a day that the Commission defended the rule of law and a Member State came up with a laughably weak legal defence. It is tempting simply to predict that the Court will soon rule in the Commission's favour and order the Supreme Court's Disciplinary Chamber – whether or not only with regard to its disciplinary competences– to seize activities. But leaving it at that would be a short-sighted misreading of what happened today – and every other day in Warsaw and Budapest with PiS and Fidesz in power for that matter. Buying time and smoke-and-mirrors is the name of the autocrats' game (if you have not yet read it, make this must-read by Pech and Scheppele a priority). Legal arguments employed by autocrats are not *legal* arguments but fig-leaves and decoys providing cover to facilitate an undemocratic take-over. Once you understand that "game", you realise the need to change tag entirely. Here are some thoughts on how to.

First, if you are in the Court, your focus should be less on content and specific formulations in this interim measures ruling and more on timing, i.e. specifically on the date of Monday 20 March. This is the day for which a trial at the Disciplinary Chamber is scheduled against Igor Tuleya under the new Muzzle Law, which entered into force on 14 February and was immediately applied to this renowned judge. If as Court you want to have an impact in the real Polish here and now, your ruling needs to be out before that. That would have a very powerful implication of pointing out that you not only apply the law, but also *proactively* guard its spirit. One European judge having been disciplined already should be one too many and more than enough.

Second, the Commission must initiate at least two more infringement actions, one targeting the Muzzle Law (as also argued in this open letter), another the neo-KRS. Both should immediately include interim measures to disable and disqualify as a matter of Union law all relevant actors that would effectively execute decisions.

Crucially, and this immediately illustrates some of the savvy ways autocrats often hedge their bets, this action must include another newly established Chamber of the Supreme Court, the Extraordinary and Public Affairs Chamber which has been given powers to execute the Muzzle Law (see here). (If you, member of the Court, are still reading along – it may be wise to formulate the ruling in the interim measures case of today to include this Chamber too, e.g. by reading the Commission's argument teleologically to aim at any disciplinary competence now vested in any of the illegally constituted chambers of the Polish Supreme Court).

Third, today five Member States supported the Commission in defending the rule of law. That means that (disregarding Hungary) twenty others could not be bothered to openly defend the very foundation of the EU. For every 5, only 1 Member State delivered the goods. If you read this, and you are from one of these twenty Member States, perhaps you should contact your government, asking them why 9 March was not noted in their diaries with the same big letters as in many a Polish diary? The situation in Poland directly impacts the situation in [fill in the name of your Member State here]. Contact national parliamentarians and ask them to ask. Five is simply too few, politically. That is the hard math of European politics in the Council and the European Council. The clock is ticking.

Fourth, perhaps least intuitively but arguably most important symbolically and politically, it is not only the three actors mentioned above. MEPs are often quick to tell the world about all the things that *others* should do. But where was their *own* legal service today? If you are an MEP dedicated to defending the 'rule of law', perhaps an idea to give them a ring to ask? It is not about any novelty in arguments. But optics and numbers matter, including in a courtroom. Another aspect that the Parliament should immediately deal with itself is walking its rule of law talk with regard to – again – *itself*. There is an urgent need to take seriously the legal obligation that every European political party complies with basic EU values (see here for details). That each mainstream party now harbours national autocrats *by the EP's own definition* is not only illegal as a matter of Union law. It is also a political outrage that will soon eat the EU from within if not acted upon quickly. Princeton professor Jan-Werner Muller explained it well last week. Most outrageous of all – it is not even needed, because values compliant MEPs are actually in the majority in the EP if only if they worked together better (see here). Action on this front by rule-of-law minded MEPs themselves is criminally overdue. Leadership always starts at home. Because pointing to problems of an autocratic Member State when you sit in the EP is simply pointing in the mirror – national ruling parties send representatives as MEP that you, as a well-intentioned MEP, rub elbows with every day. You shouldn't (or at the very least give them clear deadlines to comply and explain why it does not affect your fight to protect the EU's foundations in the meantime).

Repaying Pawe#, protecting Igor

Defending the rule of law in the EU is not about talking law to cheats. Neither is it helped by collecting ever more info about stuff we already see and know. Been there, done that, didn't work. When everything is said and done, when you look beneath and beyond baffling legal arguments, autocrats are not secretive about

their destructive intentions and their dedication to act on them. They are playing for time, for *faits accomplis*. And they are making identifiable victims, fellow EU citizens. Autocrats are succeeding, because we seem to be going out of our ways to let them. To protect what is most valuable in our Union we need to build a coalition to take the initiative off, and the fight to autocrats. We need to get into their heads to get ahead of them and to stop them in their tracks. This is a fight, not a “constructive dialogue” (the usual language). It is a fight that we cannot afford to lose.

The author and Judge Pawe# Juszczyszyn (l)

Hopefully 9 March 2020, and the interim measures that will likely follow soon based on this hearing, will come to mark a turning-point in that regard. Because I am quite sure judge Pawe# Juszczyszyn agrees that he should remain the only ever judge disciplined for honouring his duty to apply Union law and protect European citizens. Ten years from now his case and courage should stand as a reminder that we were once naïve, but then picked ourselves up and defended our basic values through a multi-pronged strategy. Start by not looking at others, but by doing what you yourself can and should do.
